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IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted] 103

ALBERT S. CRAIG, *et al.*,

Appellants,

vs.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellee.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellant,

vs.

ALBERT S. CRAIG, *et al.*,

Appellees.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Far West Engineering Co., Inc., a corporation, prays that a Writ of Certiorari issue to review the decree of the Court of Appeals for the Ninth Circuit entered on April 7, 1959, affirming the judgment of the United States District Court for the Southern District of California, Central Division.

OPINION BELOW.

The opinion of the Court of Appeals for the Ninth Circuit filed on April 7, 1959, has not yet been reported and appears for convenience in the Appendix of this Petition.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

The date of the decree sought to be reviewed and the date of its entry is April 7, 1959.

The statutory provision believed to confer jurisdiction on this Court to review the decree in question by Writ of Certiorari, is the Title 38, *United States Code*, Section 1254.

QUESTIONS PRESENTED FOR REVIEW.

1. May a District Court and/or a Court of Appeals in a Fair Labor Standards Act case decide a question of exemption contrary to a decision of this Court on an *identical fact* situation?

2. May the discovery processes set up in the *Federal Rules of Civil Procedure* be flouted and ignored *without penalty* by parties litigant?

3. Is the actual performance or supervision of design engineering in California by Californians in interstate commerce *per se*?

4. Is the statutory exclusion of an employer's liability for non-payment of overtime in good faith inapplicable even where found by the District Court?

STATEMENT OF FACTS.

The defendant Far West is and was an engineering company doing design and consulting engineering work in the mechanical, electrical or atomic energy line. [Tr. p. 151.] There is no contest about the fact that the ten plaintiffs were employed by Far West. The individual rates of compensation and the actual hours worked by plaintiff were established by the payroll records of Far West. [See Exs. A to J.] These varied from $4.75 to $3.50 per hour.

The nexus of the controversy concerns the present contention of the plaintiffs that certain hours beyond forty in a given work week should have been compensated at the overtime rate of time and a half rather than on a straight-time basis. [Tr. pp. 1-12.] The defendant, Far West, contended that the subject employees were exempt, as supervisory or professional personnel, from legislative overtime provisions and that the work done was creative and design activities not in interstate commerce. [Tr. pp. 13-18.]

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

A. PLAINTIFFS WERE EXEMPTED FROM THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT BY REASON OF THEIR STATUS AS SUPERVISORY OR PROFESSIONAL EMPLOYEES.

I.

On a Professional or Executive Basis.

Section 213(a)(1) of Title 29, *United States Code* exempts from the wage and hour provisions of the Act "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined by the Administrator." It is true, of course, that the Administrator's regulations, Section 541.1 and 541.3 and his Interpretations thereunder, do impose the artificial additional requirement that in spite of the fulfillment of all other factors, payment of the employee on an hourly basis destroys the exemption.

The record will be epitomized hereinafter as to the employees involved, but it is interesting to note that plaintiffs and the Department of Labor (as *amicus curiae*) persuaded the Court of Appeals to adopt such a view. Speaking of this specific requirement in the regulations, the Court of Appeals opinion states:

> "Although at first blush it does not seem to this Court to be logical, other courts have determined that to qualify as an exempted employee the worked must be paid on a 'salary basis.' (Citations omitted.)
>
> "Apparently the question has never been passed on by this Court, although it has been considered by a district court in this circut, wherein it was held that

a salary basis of compensation was 'a primary essential' in order to constitute an exempt employee. *Gorchakoff v. California Shipbuilding Corp.*, S. D. Cal. 1945, 63 F. Supp. 309, 311. The effect of this rule in its practical application could have inconsistent results. Thus hypothetical Employee A who meets all the standards set out in the regulations, *except* that he is paid on an hourly basis rather than a 'salary basis,' is not within the exempted class. But Employee B who meets all of the requirements of the regulations, including being on a 'salary basis,' is exempted by Section 13(a)(1) of the Act. Yet both men may be performing the same duties in return for the same amount of compensation with the same firm.

"However, we agree with the other circuits that this particular regulation pertaining to 'salary basis' compensation must be taken to mean precisely what it says, and that it is a reasonable exercise of authority delegated to the Administrator. . . ."

This Court has had occasion to deal recently with this precise problem in *Mitchell v. Lublin, McGaughy & Associates*, 358 U. S. 207. It appears clear the professional and supervisory personnel were considered *exempted* under the regulations, for the Court states:

"The parties are agreed that respondent's professional employees—architects and engineers—are exempted from the coverage of the Act by Sec. 13(a)(1), 29 U. S. C. Sec. 213(a)(1). Therefore, the Secretary's injunction action is directed at some fifty employees mentioned above: draftsmen, fieldmen, clerks and stenographers."

This quotation from *Mitchell v. Lublin, et al., supra,* is singularly significant, for the actual Transcript of Record before the Supreme Court of the United States (of which certainly this Court may take judicial notice) shows a factual situation precisely like the one here. At page 12a of the *Mitchell v. Lublin, et al., supra,* Transcript of Record before the Supreme Court of the United States, the stipulated facts establish that the "defendants are architects and consulting engineers" and that "a detailed schedule of current employees, showing their qualifications and rates of pay is attached hereto as Exhibit B." At page 140a of the same transcript appears a "Portion of Stipulation." It will be noted that two of the employees, referred to under the occupation column as "Architect," to wit, Bendixen, Warren F. and Patterson, Gerald R., *are hourly employees at $2.50 per hour.* This Honorable Court, the highest Court in the Land, has declared a professional exemption exists, which the Court of Appeals refuses to recognize, although conceding that denial of the exemption "does not seem to this Court to be logical."

Now, let us review, in epitomized form, the actual record as to the subject employees in this action:

1. As to the Plaintiffs Morrison, Gindes, Linick, Massar, Gaiennie, and Soldis.

These six plaintiffs apparently did not attach sufficient importance to the trial to attend. None were present or gave testimony. At the conclusion of the evidence, the trial judge stated concerning them [Tr. p. 256]:

> "The Court: I will tell you something Mr. Kraker. you (128) have elected not to call these other witnesses. That is your responsibility. But in view of

the fact that there is a sharp conflict in the evidence as to what these people did, and in view of the fact that your witnesses have no personal knowledge of the amount of time that these people spent in each category, I must find for the defendant on all cases in which the plaintiffs are not here."

In view of the evidence adduced, it is difficult to understand why the trial judge changed his mind on the subject. What, then, was the state of the record at the conclusion of the trial as to these plaintiff? The defendant Far West's payroll records, true enough as heretofore adverted to (Exs. A to J), were introduced, showing the hours worked during the periods in question and the substantial rate and compensation paid plaintiffs. The following is the unchallenged evidence as to each plaintiff:

a. *The Plaintiff Lynn Morrison.*

Chief engineer of the Airport office of the defendant Far West. He was in charge of all of the work at that office. "He hired and fired." [Tr. pp. 150-151; see also Pltf. Ex. 1, p. 29.] His background, qualifications and performance had been observed before designation. [Tr. p. 162.]

b. *The Plaintiff Philip Gindes.*

A supervising engineer. He did administrative and executive work, and kept engineering records. He parceled out the work to the other men, and had the right to hire and fire the men under him. [Tr. p. 145; Pltf. Ex. 1, p. 42.] Various references to his activities appeared in the trial transcript. Probably the trial court's summary concerning him, at

the conclusion of the evidence, is illuminating [Tr. p. 257]:

> "As to Mr. Gindes, although he is not here, the testimony I think is clear that he was acting much more in a professional capacity than probably any of these plaintiffs."

c. *The Plaintiff James M. D. Linick.*

A graduate engineer. Selected as a professional engineering supervisor and put in charge of a group of men at the Pico plant. [Tr. p. 147.]

d. *The Plaintiff George D. Massar.*

Experienced in schematics and wiring diagrams. For a short period of time of his employment, worked as a leadman for a small group of draftsmen. [Tr. p. 155; Pltf. Ex 1, p. 46] A "leadman" parceled the work out to draftsmen for execution; checking it on its return. [Tr. p. 205.] Massar read engineering drawings and had several draftsmen under his supervision. [Tr. p. 146.]

e. *The Plaintiff Warren L. Gaiennie.*

Liaison engineer between the defendant Far West and Hughes Aircraft. His duties included picking up the work at Hughes, obtaining the technical explanations as to what was to be done, conveying work to Far West, and returning the completed jobs to Hughes. [Tr. p. 150; Pltf. Ex. 1, p. 29.]

f. *The Plaintiff Joseph P. Soldis.*

During the three-week period in question, he supervised the electrical section of the Far West engineering department. His work during the period in question was to distribute the work to the leadmen, keep track of the time spent, and advise and oversee

the work to see that it was done properly. [Tr. pp. 148-149.]

The foregoing recitals are not the bare contentions of the defendant Far West. There was no evidentiary conflict as to the professional, engineering, and high-pay status of each plaintiff's position. Yet, with nothing more in the record and after the close of the case, the trial court reconvened the proceedings, stated it had been in contact with the Department of Labor, and subsequently signed findings proposed by plaintiffs. [See Tr. pp. 259-260.] Findings were made as to each plaintiff substantially as follows:

> "That plaintiff, having been an hourly employee, the exemptions under Section 13(2)(1) of the Act, or any other provisions thereof, do not apply." [Tr. p. 50. Each plaintiff's case has a similar finding.]

It is probably fair to characterize this finding, particularly in view of the evidentiary posture, as a rather sweeping generalization without support in the law passed by Congress.

2. As to the Plaintiffs Ingildsen, Pyle, Craig, and Clement.

These plaintiffs actually appeared at the trial. Nevertheless, surprisingly little conflict developed in the evidence about the fact of these plaintiffs being skilled, highly paid, supervisory and professional personnel. Here is the evidence:

a. *The Plaintiff Sven Ingildsen.*

Engineer in charge of the Pico office of Far West (except for about two months when he was doing checking work at the Airport office) for about two and a half years. He hired and fired employees,

and asked for pay increases for them. [Tr. pp. 144-145.]

Plaintiff Ingildsen, in his testimony, made some effort to minimize his position at Far West, but admitted that he was a graudate engineer and had been a room boss for Far West [Tr. p. 20], and that as such he was in charge of the entire drafting room, and distributed the work which came in "to the different designers, draftsmen, and so forth." Although initially stating that he had little discretion as to hiring and firing personnel, he finally conceded that he did have considerable discretion. [Tr. pp. 213-214; *cf.*, Ex. K.]

The Court said of plaintiff Ingildsen in its trial end summary [Tr. p. 257]:

> "With reference to Mr. Sven Ingildsen, I have come to (129) the conclusion that certainly as to the nine months in which he was acting as room boss he is not entitled to recover. As to the two months in which he was performing the same type and character of work which other men did, and in which he testified he was doing checking work and also some work of the same type and character as the people under him, I am going to allow him to recover for those two months. As to all the previous time, if it is not barred by the statute of limitations, I will take a look at that."

b. *The Plaintiff Frederick J. Pyle.*

Graduated as an engineer. Was put in charge of a group of electrical designers and draftsmen at Far West. [Tr. pp. 146-147.] Plaintiff Fyle, in his testimony, stated that he had graduated with a

B.S. degree in engineering [Tr. p. 199] and while with Far West was a senior engineer or senior designer who would make a layout and ask other draftsmen to do the detail work. [Tr. p. 191.]

c. *The Plaintiff Albert S. Craig.*

Plaintiff Craig testified that he was a graduate engineer. [Tr. pp. 169-170.] He engineered and designed air test equipment at Far West for Hughes Aircraft [Tr. p. 142], and was paid $3.75 per hour.

d. *The Plaintiff Carl L. Clement.*

Chief project engineer on the Hughes design project. [Tr. p. 143.] He was a graduate engineer, and would obtain the Hughes work and hand it over to the leadmen for performance. [Tr. p. 219.] Plaintiff Clement was somewhat self-effacing about his capacity to the point that the Court remarked, "That is all. I am not impressed with this claim." [Tr. p. 221.]

The Court characterizes plaintiff Clement's testimony at the trial's end as follows [Tr. p. 257]:

> "As far as Mr. Clements is concerned, I don't think the work which he performed, particularly in view of his frank statements as to the type of work he did would appeal to any court. It certainly doesn't appeal to me, and I am going to deny him recovery."

It is simply appalling to assert that the evidence as set forth recommends itself to any Court as an example of worker exploitation. These were the professional men and supervisors at Far West. No deception as to inflated title-designations is apparent from the testimony. But, in addition look at the distribution averages at Far West in

various positions, as requested by plaintiffs during certain years. [See Plft. Ex. 1, pp. 9-10.] The staff appears in adequate proportions to the type of technical work being done. It is respectfully submitted that the evidence gives no justification for recovery by these plaintiffs.

II.

The Evidence Confirms the Exemption Status of Plaintiffs by Reason of a Guaranteed Compensation Arrangement.

It will be observed that the various plaintiffs fit clearly within the purview of one or the other of the regulations cited. It might be argued that the plaintiffs were not in the exempt category because they were paid on an hourly basis. [The reason for this, the defendant Far West pointed out, was because its contracts were on an hourly rate basis Tr. p. 143.] However, the defendant Far West's testimony was to the effect that a guarantee was given to the individual professional and/or supervisory personnel. [Tr. p. 159.] The four testifying plaintiffs' testimony was not entirely in accord with this, but it is probably fair to assume that there was a guarantee. See plaintiff Pyle's testimony at page 195 of the Transcript.

It should be borne in mind, also, that even in the face of the most extended application of the Administrator's regulations, the interpretative decisions, bulletins, and releases of the Administrator under the Fair Labor Standards Act are to be accorded respect and consideration as informed opinions. However, they "do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do." *Skidmore v. Swift & Co.*, 323 U. S. 134, 139. The intent of Congress should clearly govern.

What was the intent of Congress? Fortunately, Congress in the enactment of the subject legislation, made a declaration of intent. Section 202 of the *United States Code* provides:

> "(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, or labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of worker (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.
>
> (b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct, and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

Actually, the defendant Far West's testimony was to the effect that there was a conference and a guarantee arrangement given to the supervisory and professional personnel placed on a straight-time basis. [Tr. p. 159.] Plaintiffs appear to deny this, but the plaintiff Pyle's testimony places some equivocation if not denial of this [Tr. p. 195]:

> "The Court: What happened then? Were you told that you could work overtime if you waived the

overtime rate? A. Yes. and they said that I would be working more hours than 45. Now I couldn't honestly say they did or did not guarantee me any specific number of hours."

The plaintiffs' thesis or apologia may be contained in the rather cynical testimony of plaintiff Craig, who stated [Tr. p. 177]:

"A. Yes. I was told that I would receive $3.75 an hour. At first I was under the impression that things were supposedly picking up. They were working a 45-hour week at the time, and I was paid time and a half over the 40 hours for the first three weeks. Then I discovered there were men working 60 hours a week and also getting overtime. Well, I began being a little (43) interested. I figured when I was there already, why shouldn't I work 60 hours, too, and make that much more money. It would have amounted to about $260, which is not exactly a low salary."

And on page 179 of the Transcript:

"The Court: Compensation at the rate of $3.75 an hour usually implies some type of skill other than that of an ordinary laborer, doesn't it? A. Not in job shops, sir. If you go out for a job under—well, I hate to use the word 'arrangement,' but in an average company that may be considered high. My rate today is $800 a month. I mean that is my salary. The only time you can make money in a job shop is in overtime, when they pay you time and a half. When they don't it is foolish to work for them, because (45) you can go out and make the same salary elsewhere. That is exactly what I did.

The Court: You work for $800 a month now? A. Yes."

Does the cause here involved recommend itself as one which Congress sought and intended to correct when the Fair Labor Standards Act was enacted? Are these plaintiffs the downtrodden, exploited workmen within the "mischief Congress sought to correct? Their own testimony nullifies this. Their attitude, even at this late date, in pressing for penalties under the Act against their former employer indicates either animus or a desire to achieve the maximum speculative recovery. It is submitted that an approach such as this destroys and desecrates the benign purpose which Congress had in mind in passing the subject legislation, and which this Court should not permit under the guise of the wooden application of administrative interpretation.

Aside from the presentation of defendant Far West, above, additional corroboration exists in the record. An examination of Exhibits A through J shows the following, as testified by the defendant Far West's president [Tr. p. 159]:

Plaintiff's Name	Amount for 40 Hrs. 5 Hrs. Overtime (Weekly Guarantee)	Actual Approx. Average Weekly Earnings During Supervisorial Period
Craig	$178.13	$221.10
Soldis	190.00	233.60
Gaiennie	125.88	171.50
Morrison	201.88	256.40
Pyle	178.13	203.10
Ingildsen	178.13	212.10
Clement	178.13	242.60
Linick	166.25	178.40
Gindes	190.00	228.30
Massar	130.62	142.70

(Care should be taken to avoid confusion with other weeks shown, where, as appears, both straight-time and over-time were paid.) Now, for the period of supervi-

sory engineering work, as alleged by the complaint, and limited only to the executive "straight-time" weeks, the Exhibits A through J (excluding, of course, in certain instances, the commencing or terminal weeks), demonstrates that the weekly guarantee was exceeded. Furthermore, it seems difficult to justify the Court's Findings of a lack of a Title 29, *United States Code*, Section 207(e) "guarantee" in the instances where the employees did not even appear to controvert the employers testimony of a guarantee.

III.

Petitioner Was Excluded From the Applicability of the Fair Labor Standards Act by Reason of the Provisions of the Court's Findings Under the Subject Legislation.

Pursuant to the trial court's direction, plaintiffs submitted and the Court signed in each of the within cases a *finding* substantially as follows [Tr. p. 47]:

> "VIII.
>
> That defendant's failure to compensate Craig for such employment in excess of forty (40) hours in such workweeks at rates not less than one and one half (1½) times the regular rates at which he was employed was in good faith."

Section 258 and 259 (*29 United States Code*) provide that liability or punishment will not accrue to the employer who, acting in "good faith" upon the approval or interpretation of the Department of Labor, fails to pay overtime compensation under the Fair Labor Standards Act.

This cause is now past the contention stage. The trial court, based upon evidence in the record [see, *e.g.*, Tr.

pp. 164-167], made the *finding* quoted above that the defendant Far West's failure to compensate plaintiffs for employment in excess of 40 hours per week *"was in good faith."* As previously declared in a case of similar character, *Lassiter v. Guy F. Atkinson Co.*, 176 F. 2d 984, at page 993:

> "Whether the employers here acted in good faith is essentially a question of fact. This fact has been found by the trial court."

It is possible to make the argument that the approval or interpretation must invariably be (1) in writing, and (2) by the Wage and Hour Division of the Department of Labor. The Courts have not required so inflexible and wooden an approach.

See:

Reed v. Murphy, 332 F. 2d 668, 674.

B. THE PLAINTIFFS PHILIP GINDES AND JAMES M. D. LINICK, HAVING INVOKED THE JURISDICTION OF THE DISTRICT COURT, BUT REFUSING TO SUBMIT TO DISCOVERY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, SHOULD HAVE THEIR ACTIONS DISMISSED.

With reference to this matter, here are the undisputed facts:

1. Both plaintiffs, Gindes and Linick, were served with a subpoena *re* deposition. [Tr. pp. 90-91, 117-118.]

2. Timely notice of the taking of these plaintiffs depositions was given to opposing counsel. [Tr. pp. 19-21.]

3. Counsel for these two plaintiffs moved the District Court for protection and delay of the depo-

sitions [Tr. pp. 98-99, 137], which motions the Court denied on hearing, stated:

"I think if the plaintiffs come here and want the process of this court they had better be prepared to submit to its processes." [Tr. p. 138.]

4. The plaintiffs Gindes and Linick did not appear for the taking of their depositions. [Tr. pp. 92-102.]

5. Defendant Far West's motion to dismiss the two plaintiffs was "denied without prejudice to its renewal at the time of trial." [Tr. pp. 109, 120.]

6. Neither plaintiff, Gindes nor Linick, appeared at the time of trial, their counsel there reporting [Tr. p. 224]:

"Mr. Kraker: Mr. Gindes is on defense work in Philadelphia. He should be back within a few days. . . . Linick is not available."

7. Defendant Far West's renewed motions to dismiss plaintiffs Gindes and Linick [Tr. pp. 109-110, 120] were summarily denied by Judge Solomon. [Tr. pp. 112, 122.]

Such a recital makes a mockery of discovery proceedings. Here the defendant Far West, in spite of the most diligent efforts, was unable to examine the plaintiffs Gindes and Linick from the time of filing of complaint through judgment. Without citation of authority, the plaintiffs Craig, *et al.*, give two justifications, viz., a default in the Gindes case, and "there was nothing of fact discoverable from Gindes or Linick, . . ." Both the record and common sense dispute these propositions.

I.

The Gindes Case Was Never Properly in Default but in Any Event the Facts Do Not Justify Plaintiff's Ignoring Court Process.

Even though within ten days of a determination on a motion to dismiss, default was applied for in the Gindes case. [Tr. pp. 21-24.] Noting the attempt made to obtain default, the defendant Far West moved to set aside the same promptly. [Tr. pp. 25-30.] Hearing was held on this motion and determination in favor of defendant Far West's position was made on January 13, 1958 [Tr. p. 43], and before the scheduled appearance of the plaintiff Gindes pursuant to *notice and subpoena* on January 14, 1958. [Tr. pp. 90-91.] In setting aside the attempted defaults on January 13, 1958, the Court remarked [Tr. p. 131]:

> "The Court: I think the defaults were prematurely taken, counsel. I do not think there is any excuse for them having been entered, and the motion to set aside the defaults is granted."

At the same hearing, on January 13, 1958, the plaintiffs Gindes' and Linick's motions for protection and for delay in the taking of their depositions as set for a date thereafter, came on for determination. During his argument, counsel for plaintiffs stated as follows [Tr. p. 137]:

> "All of the plaintiffs have been subpoenaed for the taking of their depositions on January 14th. Technically the plaintiffs under dispute did not have to respond to the subpoena. However, I am not arguing that."

At the conclusion of the hearing, the Court announced from the bench that the motions to continue the time of taking depositions would be denied. [Tr. p. 38.] This was formalized by minute order the same date. [Tr. p. 43.]

II.

Failure of the Plaintiffs Gindes and Linick to Observe the Court's Subpoena Re Deposition Is Not Excused by Their Assertion That "There Was Nothing in Fact Discoverable From" Them.

The fact that plaintiffs contend to the contrary is surprising. It is less surprising that plaintiffs are unable to cite a single authority to support their remarkable proposition. It is submitted that there is no such authority, and that such a position is intellectually insupportable.

In view of the uncontradicted facts heretofore set out, one may feel morally confused at plaintiffs' position. However, one cannot fail to feel logically outraged. What right does the adverse party have to adjudicate in advance the course, scope, and value of a particular line of discovery inquiry to a particular litigant? Courts have heretofore spoken to uphold the sanctions supporting the discovery process.

Collins v. Wayland, 139 F. 2d 677.

May plaintiffs, who invoked the jurisdiction of the Federal Court, with impunity flout the very discovery principles there established? Perhaps they intended to answer inferentially in the affirmative. It would be difficult to imagine a more patent disregard of Court process or the rights of a party litigant. With an uncontradicted record, if the *Federal Rules of Civil Procedure*, and particularly Rule 37(d) thereof, mean anything, this is not an appropriate area of discretion. Disobedience of judi-

cial process should carry the consequences the law provides, or we should frankly abandon the concept of the authority of judical process in favor of a rule of convenience.

C. THE WORK HERE INVOLVED IS NOT "INTERSTATE COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT.

It is undisputed that what we are here considering is the performance, supervision, and direction of design engineering and drafting work—all in California and at California facilities by California *engineers*. Goods, as such, were not produced, nor were tools, or dies fabricated to produce the same. Merely, we have purchase orders being issued by a principal company to petitioner Far West for specific quantities of hours of engineering design time, for draftsmens' time, checking time, etc. [Tr. pp. 184-185.] The individual plaintiffs' professional activities, set out in preceding Section A of this petition, should be considered in the light of the following propositions:

1. Congress did not, in the enactment of the Fair Labor Standards Act (*29 United States Code*, Section 201 *et seq.*) exercise the full measure of its commerce power, but instead proposed to leave local business to state regulation.

E. C. Schroeder Co. v. Clifton, 153 F. 2d 385.

2. Courts should not by forced argument extend congressional enactment beyond their reasonable confines in assertions of interstate commerce.

Jenkins v. Durkin, 208 F. 2d 94.

3. Nearness to or possible implication in interstate commerce is not the test. The term "engaged in interstate commerce" as used in the Act is not one merely limited by the power of imagination.

Mateo v. Auto Rental Co., 240 F. 2d 831.

4. It is the nature of the employee's work rather than the nature of the employer's business which brings him within or excludes him from the Act.

Johnston v. Cotton Producers Assn., 244 F. 2d 553.

(a) Even in cases where the employees work on materials brought in from outside of the state, coverage is not automatic.

Selby v. J. A. Jones Const. Co., 175 F. 2d 143.

(b) Nor is coverage automatic because the employer engages in interstate commerce or has offices in various states.

Mitchell v. Household Finance Corp., 208 F. 2d 667.

Reference to the payroll records will show all of the plaintiffs as highly paid professional employees. [Exs. A. through J; *cf.*, Tr. p. 177.] All had professional qualifications and either did or supervised the doing of design engineering. The work performed was done solely in California. One plaintiff only, Carl L. Clement, would from time to time travel to Tucson, Arizona to pick up work or papers or to return completed work for Hughes, Tucson. Of Mr. Clement, at the conclusion of his own testimony, the trial judge remarked [Tr. p. 224]:

"The Court: I suggest that you have the other people. I will tell you, I am not going to allow this

man anything, because I don't see how this man would be entitled to one penny. Do you think so under the testimony he has given? You are just wasting my time and wasting your own time wasting this man's time."

The Department of Labor cited the decision of *McComb v. Turpin*, 81 Fed. Supp. 86 in its Interpretative Bulletin, Part 776, Subpart A, General (May, 1950), Title 29, Chapter V, *Code of Federal Regulations* (776.19(b) (2)), saying:

> "On the other hand, the legislative history makes it clear that employees of a 'local architectural firm' are not brought within the coverage of the Act by reason of the fact that their activities 'include the preparation of plans for the alteration of buildings within the state which are used to produce goods for interstate commerce.' Such activities are not 'directly essential' enough to the production of goods in the buildings to establish the required close relationship between their performance and such production when they are performed by employees of such a 'local' firm."

In a somewhat broader sense, the Supreme Court, in declaring maintenance employees in a building including a large number of tenants in interstate commerce as exempt from the provisions of the Fair Labor Standards Act, stated (10 *East 40th Street Building, Inc. v. Callus*, 325 U. S. 578, at page 583):

> "Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process

is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by these considerations pertinent to the Federal system which led Congress not to sweep predominantly local situations within the confines of the Act. To assign the maintenance men of such an office building to the productive process because of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them. Dialectic inconsistencies do not weaken the validity of practical adjustments, as between the state and federal authority, when Congress has cast the duty of making them upon the Courts. Our problem is not an exercise in scholastic logic."

This Court has had recent opportunity to discuss coverage of the Act over nonprofessional employees in the architectural and engineering field, such as "draftsmen, fieldmen, clerks and stenographers," who worked in connection with the plans and specifications produced. *Mitchell v. Lublin, et al., supra.* However, the opinion of the Court indicates these personnel actually did move themselves and send end-product materials, in that case the plans themselves, across state lines. This is not the same sort of a case, it would seem as within the purview and definition of *Fowell v. United States Cartridge Co.,* 339 U. S. 497.

In connection with this matter, it is doubtless fair to point out that a cook and caretaker for maintenance-of-

way men *on an interstate railway line* has been held not covered by the Act.

McLeod v. Threlkeld, 319 U. S. 491, *cf.*;
Chicago & E. I. R. Co. v. Industrial Com., 284 U. S. 296.

The Court will, in delimiting the coverage of an Act of Congress, give great if not controlling consideration of the evils intended to be corrected by the subject legislation.

Apex Hosiery, v. Leader, 310 U. S. 469.

It would seem clear, in evaluating the intent of Congress in enacting the *Fair Labor Standards Act*, Title 29, *United States Code*, Section 202, that plaintiffs Craig, *et al.*, have not carried the burden of proof in establishing here "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being" of the workers here involved.

CONCLUSION.

It is respectfully submitted that the Judgment of the District Court and of the Court of Appeals is erroneous and should be reversed with instructions, on the grounds heretofore set forth.

Respectfully submitted,

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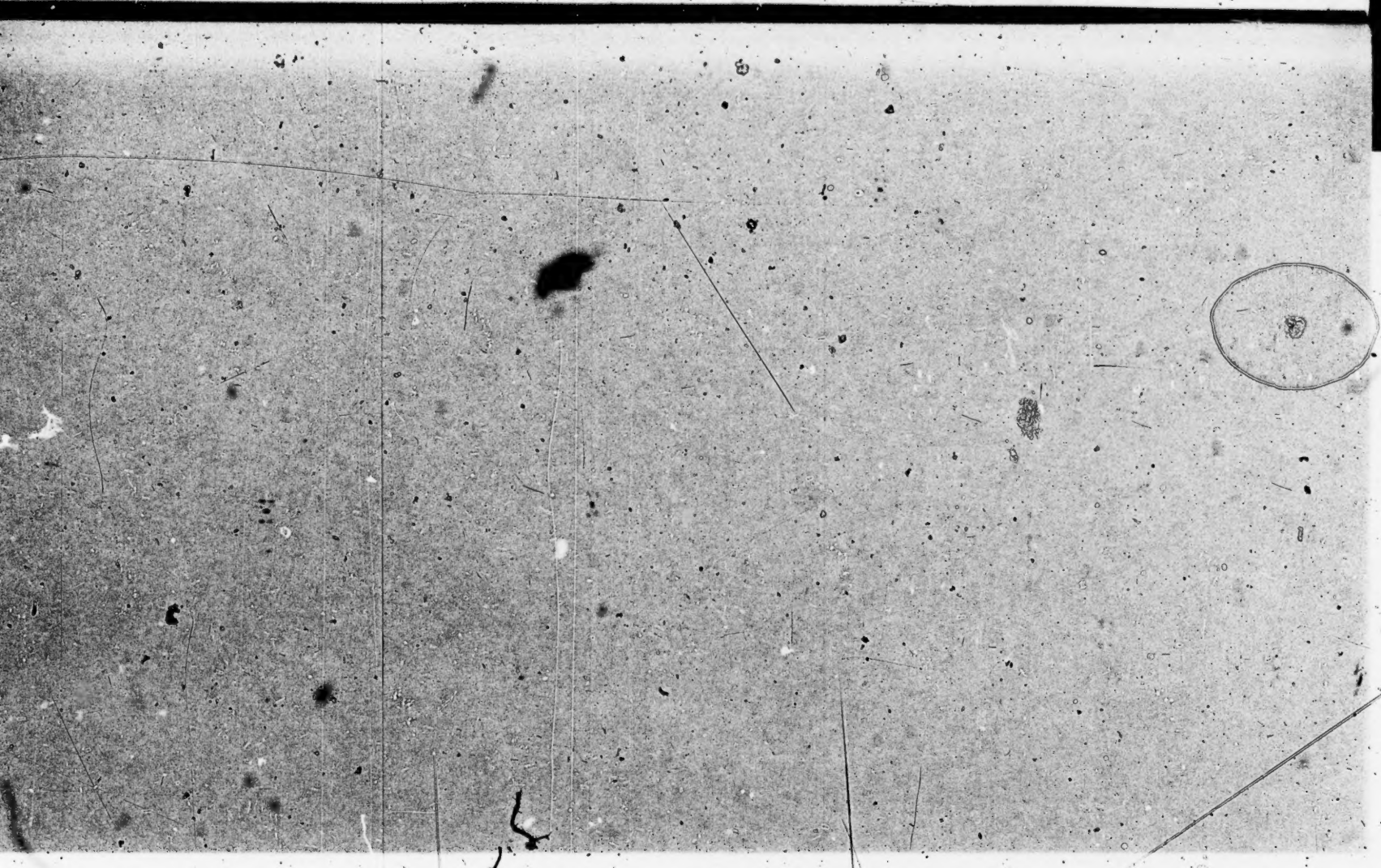
Attorneys for Petitioner, Far West Engineering Co., Inc.



APPENDIX A.

In the United States Court of Appeals for the Ninth Circuit.

Albert S. Craig, *et al.*, Appellants, vs. Far West Engineering Company, Inc., a corporation, Appellee. Far West Engineering Company, Inc., a corporation, Appellant, vs. Albert S. Craig, *et al.*, Appellees. No. 16040.

Designation of Record.

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above-entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Exhibits in the trial court (not to be copied).
4. Opinion of the Court of Appeals.
5. The judgment or decree.
6. This designation.
7. Certificate concerning the foregoing.

JULIUS A. LEETHAM,

Attorney for Petitioner Far West Engineering Co., Inc.

APPENDIX B.

Opinion of the United States Court of Appeals, Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Albert S. Craig, *et al.*, Appellants, vs. Far West Engineering Company, Inc., a corporation, Appellee. Far West Engineering Company, Inc., a corporation, Appellant, vs. Albert S. Craig, *et al.*, Appellees. No. 16,040.

April 7, 1959.

Appeals from the United States District Court for the Southern District of California, Central Division.

Before: CHAMBERS, BARNES and HAMLEY, Circuit Judges.

BARNES, Circuit Judge:

These cross-appeals involve ten consolidated similar causes of action filed in seven complaints by onetime employees of appellee Far West Engineering Company, a corporation (hereinafter sometimes referred to as Far West), to recover alleged unpaid overtime compensation; an equal amount in liquidated damages; and reasonable attorneys' fees, pursuant to the Fair Labor Standards Act of 1938,[1] as amended.

Jurisdiction below rests on 28 U.S.C. §1337 and §16(b) of the Act.[2] Timely and proper cross appeals have been taken here. 28 U.S.C. §1291.

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[1]52 Stat. 1060 (1938); 29 U.S.C. §201 et seq. (1952).

[2]52 Stat. 1069 (1938), 29 U. S. C. §216(b) (1952). See infra, for text of this section. 13

Recovery was had in the district court by the ten plaintiffs below (hereinafter sometimes called the employees) in the following sums, respectively:

C.A. No.	Name	Compensation	Interest	Atty. Fees
1314-57	Albert S. Craig	$ 253.31	$ 35.55	$ 50.66
1314-57	Joseph P. Soldis	96.90	6.44	19.38
1314-57	Warren L. Gaiennie	123.60	8.05	24.72
1314-57	Lynn E. Morrison	415.57	35.38	83.11
1315-57	Carl L. Clement	586.09	80.67	117.22
1316-57	Sven Ingildsen	2,405.66	180.09	481.13
1317-57	Philip Gindes	427.87	58.95	85.57
1344-57	George D. Massar	165.54	21.31	33.10
1391-57	Frederick J. Pyle	542.37	65.38	108.47
1400-57	James M. D. Linick	185.62	25.33	37.12

These judgments carried costs, but no equal sums for liquidated damages were allowed. The district court found that there was no dispute as to the employment by Far West of the ten plaintiffs, nor as to their rate of pay. Employment records indicated they were paid at varying hourly rates.

Far West contends that the employees were exempt for two reasons: (Point 1) the work they did was "engineering design"— not interstate commerce, and (Point 2) the employees were supervisory or professional personnel. Far West has charged error in those two particulars, and on two further procedural grounds: (Point 3) six plaintiffs having failed to appear at the trial are not entitled to recover, and (Point 4) the district court should have dismissed the complaints of two of the said six plaintiffs for wilful failure to comply with the discovery rules of procedure in the district court.

The Secretary of Labor has filed an amicus curiae brief, devoted to the first two alleged errors hereinabove numbered, urging there was no error.

Far West, an engineering firm, was located in Los Angeles, California. It engineered and designed air test equipment for Hughes Aircraft Company and other companies. Employees Craig, Pyle, Ingildsen and Clement testified in the district court that they worked all or a part of their time during the period in question as members of a "Tucson group" which worked almost exclusively on "designs" for the Tucson, Arizona plant of the Hughes Aircraft Company. Ninety-five per cent of the work done in Los Angeles during a part of the time here involved was for the Hughes Tucson plant. Hughes gave Far West the basic design; Far West prepared the engineering drawings and delivered them to Hughes. The employees testifying described this as "very elementary or simple draftsmen's work." Far West's president described it as work only a professional engineer could do. Far West says that it paid these employees by the hour only because that was necessary because of its contract with Hughes; but that despite this, the work done by these employees was "professional," and hence exempt from the coverage of the Act.

I. Were the employees "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act?

We think that the Supreme Court has decided this question for us. In Borden Co. v. Borella, 1945, 325 U.S. 679, the Court said, production of goods "is not simply the manual, physical labor involved in changing the form or utility of a tangible article. . . . He who conceives or directs a productive activity is as essential to that activity as the one who physicaly performs it." *Id.* at 683. And in Mitchell v. Lubin, McGaughy & Associates, 1959, 358 U.S. 207, the respondent was an architectural and

consulting engineering firm which was hired to design public, industrial and residential projects and to prepare plans and specifications necessary for this construction. It had offices in Norfolk, Virginia and Washington, D.C., but many of its projects and clients were located outside Virginia and the District of Columbia. Much of its work related to government contracts and these required respondent firm to produce plans, specifications, drawings and designs which were sent out of the state to prospective builders.

The "architects and engineers" were classified as "professional employees," and hence exempted by the provisions of §13(a)(1) of the Act.[3] The "draftsmen" were grouped with the "fieldman, clerks and stenographers," as nonprofessional employees and held subject to the Act. Mr. Chief Justice Warren then says:

> "The question at issue is whether these nonprofessional employees are 'engaged in commerce' as that term is used in §§6 and 7 of the Act, 29 U.S.C. §§206, 207. To determine the answer to this question, we focus on the activities of the employees and not on the business of the employer. Kirschbaum Co. v. Walling, 316 U.S. 517; Walling v. Jacksonville Paper Co., 317 U.S. 564; Mitchell v. Vollmer & Co., 349 U.S. 427. We start with the premise that Congress, by excluding from the Act's coverage employees whose activities merely 'affect commerce,' indicated its intent not to make the scope of the Act coextensive with its power to regulate commerce. Kirschbaum Co. v. Walling, *supra*; McLeod v. Threlkeld, 319 U.S. 491. However, within the tests of coverage fashioned by Congress, the Act has been

[3] 52 Stat. 1067 (1938), 29 U.S.C. §213(a)(1) (1952).

construed liberally to apply to the furthest reaches consistent with congressional direction. . . .'

The test is 'whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.' Mitchell v. Vollmer & Co., *supra*, at 429. Coverage in the instant case must be determined by that test for, as the parties stipulated below, the draftsmen, fieldmen, clerks and stenographers all worked intimately with the plans and specifications prepared by respondent for the repair and construction of various interstate instrumentalities and facilities including air bases, roads, turnpikes, bus terminals, and radio and television installations. *In our view, such work is directly and vitally related to the functioning of these facilities because, without the preparation of plans for guidance, the construction could not be effected and the facilities could not function as planned.* In our modern, technologically oriented society, the elements which combine to produce a final product are diffuse and variegated. Deciding whether any one element is so directly related to the end product as to be considered vital is sometimes a difficult problem. But plans, drawings and specifications have taken on greater importance as the complexities of design and bidding have increased. Under the circumstances present here, we have no hesitancy in concluding that the preparation of the plans and specifications was directly related to the end products and that the employees whose activities were intimately related to such preparation were 'engaged in commerce.'"

Id. at 211-12. [Emphasis added.] *Cf.* also, Mitchell v. Brown, 8th Cir. 1955, 224 F. 2d 359, *cert. denied*, 350

U.S. 875; Ritch v. Puget Sound Bridge & Dredging Co., 9 Cir. 1946, 156 F. 2d 334; Laudadio v. White Const. Co., 2 Cir. 1947, 163 F. 2d 383.

Here, of course, there exists not only the general rule for this type of endeavor as delineated by the Supreme Court, *supra*, but the further fact that some of the employees, if not all, worked almost exclusively on drawings that were shipped to Tucson, Arizona, outside the state of California. Compare, Western Union Tel. Co. v. Lenroot, 1945, 323 U.S 490. We conclude that the employees "were engaged in the production of goods for commerce" within the provisions of the Fair Labor Standards Act.

II. Were the employees exempt as professional or executive employees, within the provisions of the Act and the regulations promulgated thereunder?

Title 29 U.S.C. §213(a)(1) provides:

> "The provisions of sections 206 and 207 of this title shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity . . . (as such terms are defined and delimited by regulations of the Administrator) . . ."

Section 207, referred to above, provides for an overtime rate of payment for more than forty hours per workweek.[4] It is, of course, on the basis of this section of the law that the employees here claim the overtime pay.

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[4]Section 207 provides:

"(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 541.1 of the regulations, issued by the Administrator pursuant to the above statutory authority, defines "bona fide executive . . . capacity,"[5] while

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[5] 29 C. F. R. §541.1, Cum. Supp. 1958:

"*Executive.* The term 'employee employed in a bona fide executive * * * capacity' in section 13(a)(1) of the act shall mean any employee:

"(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

"(b) Who customarily and regularly directs the work of two or more other employees therein; and

"(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

"(d) Who customarily and regularly exercise discretionary powers; *and*

"(e) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided,* That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; *and*

"(f) Who is compensated for his services on a salary basis at a rate of not less than $55 per week (or $30 per week is employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other facilities:

"*Provided,* That an employee who is compensated on a salary basis at a rate of not less that $100 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section."

§541.3 of the regulations defines "bona fide . . . professional capacity."[6] The regulations further provide in great detail in subpart B, 29 C.F.R. §541.99 *et seq.*, the

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[6] 29 C. F. R. §541.3, Cum. Supp. 1958:

"*Professional.* The term 'employee employed in a bona fide * * * professional * * * capacity' in section 13(a)(1) of the act shall mean any employee:

"(a) Whose primary duty consists of the performance of work:

"(1) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

"(2) Original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee; and

"(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

"(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; *and*

"(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

"(e) Who is compensated for his services on a salary or fee basis at a rate of not less than $75 per week (or $200 per month if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other facilities: *Provided*, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof:

"Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $100 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment, or requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section."

necessary interpretation to be given the standards set up in the above noted regulations.

This is not the first case where the courts have been called upon to consider and interpret the foregoing statute and regulations.

> "The precise question here is not whether the apellants were employed in an executive [or professional] capacity within the meaning the phrase may have in common usage, but whether appellants were so employed within the definition as promulgated by the administrator under authority of law."

Smith v. Porter, 8 Cir. 1944, 143 F. 2d 292, at 295. That the regulations issued by the Administrator are generally valid and binding, as a reasonable exercise of delegated authority, is well established. Sun Publishing Co. v. Walling, 6 Cir. 1944, 140 F. 2d 445, 449, *cert. denied*, 322 U.S. 728. Seee also Fanelli v. United States Gypsum Co., 2 Cir. 1944, 141 F. 2d 216; Walling v. Yeakley, 10 Cir. 1944, 140 F. 2d 830, 832. It is also well settled that the employer has the burden of proving the existence of each of the conditions or standards set up in the regulations if he claims that an employee is exempted under the Act. Walling v. General Indus. Co., 1947, 330 U.S 545, 547-48.

In the instant case it is important to recognize that it is the capacity in which the employee works, under the regulations, which controls his status of exemptibility or nonexemptibility, and not his capabilities or experience or training for some other type of work. Had Einstein been employed in a nonprofessional capacity to perform non-

professional services he would be entitled to time-and-a-half for overtime over forty hours per workweek.

Appellant Far West urges that "the various plaintiffs fit clearly within the purview of one or the other of the regulations quoted." It does not attempt to tell us which of the employees fall within the category of executives and/or which of them are to be considered in the professional category. Nor does it make any attempt to show why they would fit into either category, except the observation that there is no reason that they could not fit into one or the other just because they are paid on an hourly basis.

The government in its *amicus* brief simply says that here the trial court found that each employee was an "hourly employee" and hence "plainly . . . is not 'compensated on a salary or fee basis,'" as the regulations require.[7] Therefore, it argues Far West has not sustained its burden of bringing the employees within the exemptions provided for in the Act.

Far West would explain and justify the hourly wages paid the employees on two grounds: (a) because its contracts were on an hourly basis and it was necessary to pay the employees this way; and (b) because Far West's testimony was "to the effect" (whatever that may mean) that "a guarantee was given to the individual professional and/or supervisory personnel;" and that the four testifying employees' testimony was not in accord with Far West's testimony, but that at least one employee's testi-

[7]Amicus Curiae Brief, p. 15.

mony indicated uncertainty in denying the guarantee. Far West urges that "it is probably fair to assume that there was a guarantee." If there was in fact a guarantee, §7(e) of the Act, 29 U.S.C. §207(e), would have the effect of providing a defense for Far West in this suit.[8]

We know of no rule of law that permits this Court to assume facts in issue, when the testimony below is conflicting and has been decided adversely to such assumption by the trier of fact who was in a position to balance the value of the testimony on the question. There was no finding below of such guarantee. We must, and do, decline to assume there was such a guarantee.

Turning to the fact which the lower court felt was completely dispositive of any attempt on the part of Far West to show that these employees were in the exempted categories, we must consider next whether the lower court's classification of these employees as "hourly employees" does in fact preclude them, as a matter of law, from coming within the exempted categories provided for in §13(a)(1) of the Act, as "defined and delimited" in the regulations noted above.

As we have seen, the regulations specifically provide that the employee must be "compensated on a salary or

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[8]It provides:

"No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitates irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 206(a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified."

fee basis." 29 C.F.R. §541.3(e). Furthermore, the detailed explanation and interpretation of these regulations found in 29 C.F.R. §541.118 explains just what a "salary basis" means:

> "*Salary basis.* (a) An employee will be considered to be paid 'on a salary basis' within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly or less frequent basis, *a predetermined* amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work *without regard to the number of days or hours worked.* This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work. [Emphasis added.]
>
> . . . . .
>
> "(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.
>
> . . . . .
>
> "(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. . . ."

29 C.F.R. §541.118, Cum. Supp. 1958. Section 541.117 explains that "the shortest period of payment which will meet the requirement of payment 'on a salary basis' is a week."[9]

Was the district court correct in giving these regulations the force of law, thus precluding these employees from coming within the exempted status? The Supreme Court has told us in considering an analogous case that:

> "It is enough that the Administrator has acted within the statutory bounds of his authority, and that his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made."

Federal Security Administrator v. Quaker Oats Co., 1943, 318 U.S. 218, 233.

Although at first blush it does not seem to this Court to be logical, other courts have determined that to qualify as an exempted employee the worker must be paid on a "salary basis." Walling v. Morris, 6 Cir. 1946, 155 F. 2d 832; Hilliwell v. Haberman, 2 Cir. 1944, 140 F. 2d 833; Walling v. Yeakley, *supra*. *Cf.* also, McReynolds v. Pocahontas Corp., 4 Cir. 1951, 192 F. 2d 301; Delano v. Armstrong Rubber Co., 1950, 136 Conn. 663, 73 A. 2d

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[9] "*Amount of salary required.* (a) Compensation on a salary basis at a rate of not less than $55 per week is required for exemption as an executive. The $55 a week may be translated into equivalent periods longer than one week. The requirements will be met if the employee is compensated biweekly on a salary basis of $110, semi-monthly on a salary basis of $119.17 or monthly on a salary basis of $238.33. However, the shortest period of payment which will meet the requirement of payment 'on a salary basis' is a week." 29 C. F. R. §541.117, Cum. Supp. 1958.

Section 541.312 which covers professional employees refers us back to §541.118 for the interpretation of the meaning of "salary basis" in that section, so that both categories of employees are governed by the same rules.

828, *cert. denied,* 340 U.S. 840. And see, generally, Annot. 40 A.L.R. 2d 332 (1955), particularly at 347-49.

Apparently the question has never been passed on by this Court, although it has been considered by a district court in this circuit, wherein it was held that a salary basis of compensation was "a primary essential" in order to constitute an exempt employee. Gorchakoff v. California Shipbuilding Corp., S. D. Cal. 1945, 63 F. Supp. 309, 311. The effect of this rule in its practical application could have inconsistent results. Thus hypothetical Employee A who meets all the standards set out in the regulations, *except* that he is paid on an hourly basis rather than a "salary basis," is not within the exempted class. But Employee B who meets all of the requirements of the regulations, including being on a "salary basis" is exempted by §13(a)(1) of the Act. Yet both men may be performing the same duties in return for the same amount of compensation with the same firm.

However, we agree with the other circuits that this particular regulation pertaining to "salary basis" compensation must be taken to mean precisely what it says, and that it is a reasonable exercise of authority delegated to the Administrator. We say this because upon examination of the history behind the promulgation of these regulations, it becomes clear that the rationale underlying them is sound and apparently the one practical method of "defining and delimiting" the rather vague and ambiguous terms used in the statute. Employers, even more than employees, desire some certainty in the law. The report and recommendations of the presiding officer who conducted hearings on proposed amendments to the regulations in 1940 indicates that the employers participating in the hearings were nearly unanimous in approving the salary test because "a salary qualification in the

definition of the term 'executive' is a valuable and easily applied index to the 'bona fide' character of the employment for which exemption is claimed and which must be of a 'bona fide' executive character by the terms of the statute itself."[10] Furthermore, the report expressly points out that employees on an hourly basis cannot be considered in an executive capacity, and explains why.[11] In the section of the report on professional personnel, it is stated that "the same basic reasons which make the use of a salary test desirable in connection with the definition of 'executive' and 'administrative' are applicable here. The salary paid the employee is the best single test of the employer's good faith in characterizing the employment. "[12]

Accordingly we conclude that the district court was correct in ruling that since these employees were paid on an hourly basis they could not, as a matter of law, be within the exempted categories, Far West's contentions notwithstanding. The regulations of the Administrator are worded in the conjunctive, therefore, this failure to comply with one of the standards provided is dispositive of the question, and it is unnecessary to consider the other requirements. Walling v. Morris, *supra*. There is a finding as to each of these employees that they were paid

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[10]Report and Recommendations of the Presiding Officer on Proposed Amendments regarding the definition of the terms "Executive, Administrative, Professional . . . Outside Salesman." 2 CCH Labor Law Reporter ¶ 31,302.29 at page 31,317 (3rd ed. 1940).

[11]"[T]he requirement is not fulfilled by the earnings of a person who is paid on an hourly basis. The shortest pay period which can properly be understood to be appropriate for a person employed in an executive capacity is obviously a weekly pay period and hourly paid employees should not be entitled to the exemption. The executive status in and of itself connotes at least the tenure implied by a weekly pay period as the very minimum." *Ibid.*, ¶ 31,302.30 at page 31,319.

[12]*Ibid.*, ¶ 31,302.65 at page 31,333.

on an hourly basis, and we are bound by this, there being no evidence to the contrary. In fact, as we have pointed out above, Far West admits that this was the case in its brief.

III. The Procedural Errors Alleged By Far West

In light of the discussion of the applicability of the Act, hereinabove, and our conclusions as to the status of the plaintiff employees, we do not deem it necessary to discuss in detail the two procedural points raised by Far West. Point 3 deals with the claim that since certain of the employees were not present at the trial and did not testify there was insufficient evidence to justify any recovery as to them. Point 4 concerns the lower court's refusal to dismiss the cases of two of the employees for failure to comply with certain pretrial discovery procedures.

On the last point, we call attention to the fact that the particular rule under which Far West moved for the dismissals, Fed. R. Civ. P. 37(d), is by its very terms discretionary with the trial court. It says "the court . . . . *may* . . . dismiss the action or proceeding." The courts have so interpreted it in cases arising under the rule. Hubbard v. Baltimore and Ohio R.R. Co., 6 Cir. 1957, 249 F. 2d 885; Campbell v. Johnson, S.D.N.Y. 1951, 101 F. Supp. 705. Under the circumstances here, we cannot say that the court abused its discretion in refusing to grant the dismissals.

Second, aside from the above point, we believe that both of Far West's contentions as to procedural error are governed by the same factors. It seems to us that the short answer to both these alleged errors is that once it is established that the Act applies to these employees, there is nothing left to establish save the hours worked by these

employees. Any other evidence would be completely superfluous to the issues at hand. Evidence of just what the duties of each of the employees were, how many men they supervised, etc., is unnecessary since we have already demonstrated that regardless of their duties, they could not be considered within the exempted class since they were not on a "salary basis." The record of this case indicates that the employees established the hours they worked by introducing photostatic copies of the defendant Far West's payroll records, which the parties had stipulated would be used to determine the employees' claims. Once this was done, the employees had established a *prima facie* case for recovery of the overtime pay, which could only be rebutted by a showing on the part of Far West that there was some guaranteed salary paid to the men. This they failed to establish, for there is no finding of fact by the trier of fact to this effect. (Far West argues there should be, but as we have pointed out above, the evidence is at best conflicting and requires no affirmative finding of a guarantee.) We must conclude, therefore, that there is evidence in the record to support the judgments in favor of the employees, and that Far West's allegations of procedural error are without merit.

IV. The Error Alleged by the Plaintiff Employees

The only error claimed by the employees which we find necessary to comment upon is that an award equal to their overtime wages must mandatorily be included in their recovery as liquidated damages.[13] However, the

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[13] §16(b) of the Act, 52 Stat. 1069, 29 U. S. C. §216(b) provides: "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, *and in an additional amount as liquidated damages.* . . ." [Emphasis added.]

employees in their own brief recognize that this right to liquidated damages is limited to cases where the employer cannot establish a good faith failure to pay the overtime.[14] There are findings in each of the cases before us, by the trial judge, to the effect that the defendant employer was in good faith when it failed to pay the overtime rates. We believe this finding as to good faith is justified by the record. The trial court was not in error in so ruling.

Inasmuch as we have reached the conclusion in the preceding paragraph that the employees in the instant case are not entitled to recover any "liquidated damages," it is unnecessary to reach their contention that the lower court improperly ordered the release of certain attached funds in excess of the judgments entered. As the employees' brief, itself, indicates [p. 9], the whole basis of their appeal here is the failure of the lower court to award them liquidated damages. Had their argument been sustained by this Court, then we would have been faced with the problem of protecting the interests of the employees by seeing to it that they were able to obtain the additional monies that would then be due them as liquidated damages. As it stands now, however, there is on deposit with the court below a sum in the amount of the judgments (which include interest and attorney's fees), which judgments we have herein affirmed as rendered. Therefore, whatever the propriety or impropriety of the action of the district court in releasing these additional funds makes no difference in the outcome of this case as affirmed.

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[14]See 61 Stat. 89 (1947), 29 U. S. C. §260 (1952) which leaves the award of liquidated damages to the discretion of the trial court where the employer satisfies the court of its good faith failure to pay the overtime or minimum wages.

Furthermore, we do not find it necessary to pass upon the employees' argument that Far West waived its right to appeal by accepting the benefits of the so-called "conditional order to release," for a similar reason. The final result here is the same as though there had been no appeal. Our affirmance of the judgments as rendered makes the issue of any right to appeal moot.

The judgment of the district court is *affirmed* in all respects, as to each of the consolidated cases before us.

(Endorsed:) Opinion. Filed April 7, 1959.

Paul P. O'Brien, Clerk.